

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

*In the Matter of the Appeal of:*

**ACTION METAL RECYCLING, INC.  
320 Pittsburg Avenue  
Richmond, CA 94801**

*Employer*

**DOCKETS 13-R2D2-1125  
and 1126**

**DECISION**

**Statement of the Case**

ACTION METAL RECYCLING, INC. (Employer) purchases, sells and processes metals. Beginning on December 17, 2012, through March 21, 2013, the Division of Occupational Safety and Health and Safety (the Division) through Ronald Aruejo (Aruejo), Associate Safety Engineer, conducted an accident investigation at 320 Pittsburg Avenue, Richmond, CA 94801. On March 21, 2013, the Division cited Employer for the following violations of California Code of Regulations, Title 8<sup>1</sup>: failure to ensure its operators were competent to operate a power industrial truck safely, failure to perform required check prior to operating Hydraulic Excavator and yard mover, and failure to prevent an employee from performing repairs on an industrial truck, resulting in the employee being fatally crushed between the cab and back guard of the truck.

Employer filed timely appeals which contested whether the safety order was violated for Citation 1, Items 1 and 2. For citation 2, Employer appealed whether the safety order was violated, whether the classification was correct, whether the abatement was reasonable and whether the proposed penalty was reasonable.<sup>2</sup>

The matter was heard in Oakland, California before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on October 23, 2014, at Oakland, California. The Division was represented by Mary Allen, Esq., Staff Counsel for the Division of Occupational Safety and Health. Employer was represented by Robert D. Peterson, Esq., Robert D. Peterson Law Corporation. The third-party, the widow of the deceased employee, was represented by Jenny Jerez, Esq., Boxer Gerson, LLP. The Division and the employer presented witnesses. Documentary evidence was presented by the Division. The third-party did not present any evidence. The parties submitted post-hearing briefs, the last of which was filed on December 19, 2014, and the matter was submitted for decision at that time. The ALJ extended the submission date to June 1, 2015 on her own motion.

---

<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, Title 8.

<sup>2</sup> Employer also raised a number of affirmative defenses, which were withdrawn at the hearing.

### **Issues**

- A. Were the operators competent to operate powered industrial trucks safely, as required by Section 3668, subdivision (a)(1)?
- B. Did Perez perform the required check prior to operating the Hydraulic Excavator and tractor trailer (“goat”) as required by Section 3650, subdivision (t)(7)?
- C. Did the employer permit employees to perform repairs before arrangements were made to prevent sudden movement of equipment, resulting in employee being fatally crushed in violation of Section 3664, subdivision (e)?
- D. Was the violation of section 3664, subdivision (e) properly classified as a serious violation?
- E. Did the Division establish that the failure to make arrangements to prevent sudden movement of equipment in Citation 2, Item 1 was the cause of the accident?

### **Findings of Fact**

- 1. Perez and Rodriguez were operators of the tractor trailer (goat) and Hydraulic Excavator (excavator)
- 2. The goat and the excavator are “industrial trucks”.
- 3. The operators of the goat and the excavator did not have training and their skills were not evaluated to establish whether they were competent to operate the excavator and goat safely.
- 4. Perez did not perform the required check including evaluation of the steering fluid levels prior to operating the goat on December 17, 2012.
- 5. The piston rod of the goat was bent and the cab of the goat was stuck in the open position and would not close.
- 6. The bent piston rod which prevented the cab door from closing was not reported immediately to a foreman or mechanic.
- 7. No arrangements were made to prevent sudden movement of equipment when Rodriguez suddenly jumped on the cab of the goat to attempt to get it to close.
- 8. Rodriguez stood between the back of the cab and the roll bar mast when the cab suddenly slammed down, pinned his head and fractured his skull.

9. The failure to make arrangements to prevent sudden movement of the cab of the goat caused the employee's skull to be crushed between the cab and the roll bar.
10. The penalties were properly calculated in accordance with the Division's policies and procedures.<sup>3</sup>

### Analysis

#### **A. Were the operators competent to operate a powered industrial truck safely as required by section 3668, subdivision (a)(1)?**

The Division cited employer for a violation of section 3668, subdivision (a)(1) which states:

(a) Safe Operation

- (1) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this section.

Citation 1, Item 1 alleges:<sup>4</sup>

On and before 12/17/12, the employer did not ensure its powered industrial truck operators are competent to operate power industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this section. An employee (EE1) was fatally injured when his head was crushed between the fixed 4" x 4" metal bar/metal guard and the upper portion of the cab of a yard tractor trailer also called "goat".

The division must establish that the employer failed to ensure that 1) the employees in question were operators, 2) of powered industrial trucks, 3) who had

---

<sup>3</sup> The parties stipulated that the penalties were calculated in accordance with the Division's policies and procedures.

<sup>4</sup> In its post-hearing briefs, Division moved to amend the Citation from a "general" to an "accident-related serious" classification. The Division has not issued a 1-B-Y letter nor filed a timely motion, which would afford the employer an opportunity to prepare to defend the amended citation. The motion is denied because an "accident-related" serious" classification was not supported by the record with respect to the section 3668, subdivision (a)(1) violation because it was not shown that there is a realistic possibility that death or serious physical harm could result from the hazard created by the violation and there is insufficient evidence of causal nexus between this violation and the death of Rodriguez.

successfully completed training, and 4) were evaluated to ensure they were competent.

It is undisputed that Manuel Perez (Perez)<sup>5</sup> and Jose Rodriguez (Rodriguez or deceased) were operators of the tractor trailer (goat) and the excavator. Perez and Rodriguez drove the goat and the excavator many times prior to the date of the accident.

An industrial truck is defined as “mobile power-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is normally confined within the boundaries of a place of employment.” (Section 3649 of Article 25, Industrial Trucks, Tractors, Haulage Vehicles, and Earthmoving Equipment of the General Industry Safety Order.) The goat and the excavator were used to move equipment around the yard. Thus, the goat meets the definition of an industrial truck. The first two prongs of section 3668(a) are established.

The Board does not read each regulation in isolation, but consistent with principles of statutory construction, views this section of the regulation with reference to the whole regulatory scheme of which it forms a part. (*Devcon Construction*, Cal/OSHA App. 12-2062 (March 13, 2014), citing *Western Airlines, Inc.*, Cal/OSHA App. 86-0055, Decision After Reconsideration (Oct. 28, 1987), which cites *People ex rel. Younger vs. Superior Court* (1976) 16 Cal.3d 30, 41 [127 Cal.Rptr. 122,544 P.2d 1322]).

“Successful completion of training” is defined in the subdivisions following section 3668, subdivision (a). Subdivision (c) specifies the “training program content”. Section 3668, subdivision (c)(1)(J) requires training regarding vehicle inspection and maintenance that the operator will be required to perform and section 3668, subdivision (c)(1)(M) requires training regarding any other operating instructions, warning or precautions listed in the operator’s manual for the types of vehicle that the employee is being trained to operate”. Section 3668, subdivision (f) provides:

Certification. The employer shall certify that each operator has been trained and evaluated as required by this section. The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

The Board held in *Devcon Construction, supra*, that “[b]ased on the language of section 3668 read as a whole, it can be reasonably inferred that “evaluation” in this context is meant to be something more than the foreman running a new worker through his paces to ensure he is able to do the specific work at that jobsite. At the least, it involves showing when the evaluation happened, and who performed the evaluation.”

---

<sup>5</sup> Perez worked for Action Metal Recycling for two years prior to the accident and was terminated two months prior to the Appeals Board hearing.

Aruejo requested training records, including “machine operations (goat, excavators, forklifts)”. (Exhibit 5.) Employer sent no responsive training records. Nor were any training documents introduced at the hearing. There was no documentation of the name of the operator, the date of the training, the date of the evaluation, or the identity of the person(s) performing the training or evaluation.<sup>6</sup> Employer did not have a manual for the goat involved in the accident from which the employees could look up how to check the fluid levels or how to open and close the cab safely.

Perez, who operated the goat, testified that his safety training was not adequate. While Perez said that he was trained by Rodriguez, there was no evidence when Rodriguez was trained or whether his competency was evaluated. Vice-President Peter Jackson (Jackson) admitted to Inspector Aruejo during the accident investigation, that the competency of neither Rodriguez nor Perez was evaluated. The evidence in this record establishes that neither Perez nor Rodriguez were trained or evaluated to ensure they were competent to operate the industrial trucks.

Because the employer has not produced training records or submitted substantial evidence that training occurred, it is found that it committed a general violation Section 3668 subdivision (a)(1) by failing to train and evaluate employees to ensure their competence to operate industrial trucks before allowing them to do so.

Employer stipulated that the \$875 penalty for Citation 1, Item 1 was calculated in accordance with the Division’s policies and procedures. Citation 1, Item 1 is affirmed and a penalty of \$875 is assessed.

**B. Did Perez perform the required check prior to operating the excavator and goat as required by section 3650, subdivision (t)(7)?**

The Division cited employer for a violation of section 3650, subdivision (t)(7) which states:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

(7) Drivers shall check the vehicle at the beginning of each shift, and if it is found to be unsafe, the matter shall be reported immediately to a foreman or

---

<sup>6</sup> Employer’s contention that this safety standard does not require an employer to maintain any written records of the training is rejected. Section 3668 details the truck-related and workplace training topics which are required and subdivision (f) requires documentation of the employee’s name, date of training and name of trainer.

mechanic, and the vehicle shall not be put in service again until it has been made safe. Attention shall be given to the proper functioning of tires, horn, lights, battery, controller, brakes, steering mechanism, cooling system, and the lift system for fork (forks, chains, cable, and limit switches).

Division issued Citation 1, Item 2 alleges:

On and before 12/17/12, employees of Action Metal Recycling Inc., did not perform the required check prior to operating a Hitachi Hydraulic Excavator model number EX220LC and a "Yard Mover" or "Goat" manufactured by SISU USA Inc., vehicle # T2F5L1A00A1A01385 with a number 32 marking on the front and right side door of the cab at its worksite located at 320 Pittsburg Ave., Richmond, CA 94801.

In order to establish a violation of section 3650, subdivision (t)(7), the Division is required to establish that 1) Perez was a driver of an industrial truck or tow tractor; 2) that Perez failed to check the industrial vehicle at the beginning of each shift, 3) Perez and Rodriguez determined that the goat was unsafe, 4) Perez and Rodriguez failed to immediately report the unsafe condition of not being able to close the cab to a foreman or mechanic, and did not discontinue its use until it has been made safe. Subdivision (7) requires the pre-shift check to include giving attention "to the proper functioning of tires, horn, lights, battery, controller, brakes, steering mechanism, cooling system."

Was Perez a driver of an industrial truck?<sup>7</sup> The goat is a large flatbed semi-trailer connected to a tractor-type vehicle with a cab, roll-bar and hitch, an industrial truck. (Exhibits 9, 10, and 11) Perez was the driver of the "goat" on the day of the accident, December 17, 2012.

Did Perez check the industrial vehicle at the beginning of the shift on December 17, 2012? Perez admitted that he drove the goat and did not do the pre-shift check prior to operating it on the day of the accident, December 18, 2012. He was asked "when you started, when you were going to start driving the yellow truck that day, did you do a check of the truck?" He answered: "That day, no, because he just told me go bring the truck, and all I did was just to check it out just like this. [ . . . ] just to take a look at it and see if something was missing or whatever." Perez testified that he was being rushed to bring the vehicle over. Perez did not take the time to check the steering fluid levels prior to driving it. Checking the fluid levels and adding steering fluid required raising the cab, which was time consuming. Moreover, Perez did not know where the steering fluid went. Perez estimated that he drove the goat on approximately 80 occasions, but only raised the cab twice, prior to December 17, 2012.

---

<sup>7</sup> "Yellow truck", "yard mover" and "yard goat" refers to the goat depicted in Exhibits 9-16, 18-28.

Aruejo requested copies of the daily check records on the goat and was told by Jackson there were none. Based on the testimony of Perez and the lack of documentary evidence, it is clear that Perez had not done the pre-shift check on the day of the accident.

Was the goat found to be unsafe and in need of repair? The employer maintains that adding power steering fluid to a machine is a “servicing activity”, not a “repair”.<sup>8</sup> In *Starkist Foods*, Cal/OSHA App. 83-871, Decision After Reconsideration (Oct. 16, 1987), the Appeals Board rejected an argument to restrict the definition of “repair” and held that “efforts of the injured employee to restore the forklift to operating condition were, therefore, ‘repairs’.” The dictionary definition of “repair” is: “to restore to a sound or healthy state”.<sup>9</sup>

On December 17, 2012, after operating the goat to move three of the five loads, Perez and Rodriguez found that the steering became stiff. They decided to replenish the steering fluid. Installing steering fluid as part of the routine maintenance normally involves servicing. When they opened the cab, they bent the rod and then could not close the cab or keep the cab from moving. It was then necessary to repair the vehicle and restore it to a functioning condition, once it was discovered that the cab of the goat would not close because the hydraulic rod was bent. At that point, the goat was unsafe and “in need of repair” because the cab was not drivable and could not close. Division established this prong.

Was the problem of not being able to close the cab reported immediately to a foreman or mechanic? It is undisputed that Rodriguez went ahead with the repair, rather than reporting the problem to a foreman or mechanic. On the day of the accident, Perez raised the cab to replenish the fluid, and then he went to the warehouse to get the fluid. When he came back, Rodriguez wanted to lower the cab but the hydraulic rod was bent and the cab would not close.<sup>10</sup> (Exhibits 24 and 25.) In order to put in the steering fluid, they used a hydraulic lift to hold the cab in place, rather than get someone competent to fix it.

The fatal accident occurred when the cab could not be closed after the steering fluid was installed and Rodriguez attempted to force it closed, rather than reporting it. A violation of section 3650, subdivision (t)(7) was established.

The parties stipulated that the proposed penalty was correctly calculated in accordance with the regulations. The penalty of \$825 is reasonable and assessed, as set forth in the summary table. (§336, subd. (d)(1) – (5).)

---

<sup>8</sup> In *Lusardi Construction Co.*, Cal/OSHA 86-1400, Denial of Petition for Reconsideration (May 31, 1989), the Appeals Board distinguished servicing from repairs and held: “the work of replacing the hose, absent evidence that it is part of the routine scheduled maintenance of the edger, is more readily characterized as repair rather than servicing.”

<sup>9</sup> See, <http://www.merriam-webster.com/dictionary/repair>.

<sup>10</sup> A third party mechanic walked by while they were pondering what to do. He was not authorized to do jobs which were not approved through the front office. (Ceja)

**C. Did the employer permit employees to perform repairs before arrangements were made to prevent sudden movement of equipment, resulting in employee being fatally crushed in violation of Section 3664, subdivision (e)?**

Division cited employer for a violation of section 3664, subdivision (e):

Industrial Trucks – Operator Rules.

(e) No repairs shall be performed in any agricultural or industrial trucks or tractors until arrangements have been made to reduce the probability of injury to repairmen or others caused by sudden movement or operation of such equipment or its parts.

Division issued Citation 2, Item 1 alleges:

On 12/17/12, repairs were performed on an industrial truck referred to as a “Yard Goat”, and an employee (EE1) was attempting to pull the cab closed was fatally crushed between the cab and the back guard of the industrial truck referred to as a “Yard Goat”.<sup>11</sup> The employer failed to provide arrangements to prevent the probability of injury to the employee or to prevent movement of the parts.

A violation of section 3664, subdivision (e) is established by showing 1) an agricultural or industrial truck or tractor, 2) was being repaired, and 3) employer failed to make arrangements to reduce the probability of injury to repairmen or others caused by sudden movement or operation of such equipment or its parts.

The goat is an agricultural or industrial truck or tractor, as discussed above. The employer conceded that “[t]he evidence in this case supports no holding that ‘arrangements’ had been made to perform a repair of the goat.” (Appellant’ Post-Hearing Brief, 7:16-17.) Hence the first and third prongs are established.

The accident occurred during the process of fixing the steering problems on the goat. Perez testified that he told Rodriguez that the goat needed steering fluid, after they moved the second of five loads. Perez went to get the fluid, while Rodriguez loaded the third load. They had difficulty raising the cab of the vehicle. During this operation, the hydraulic piston rod got bent. (Exhibits 22 and 27.) Perez put the steering fluid in, but the cab was stuck in the up position and could not be closed. (Exhibit 10.) Perez and Ceja, an independent contractor who was

---

<sup>11</sup> “Yard Goat” refers to the yellow tractor trailer (goat) which is discussed throughout this decision.

walking by, were standing near the engine looking at the rod and discussing how to get the cab of the goat to close when the accident occurred. (Exhibit 10.)

Without discussing or notifying anyone of his actions, Rodriguez tried to overcome the bent piston rod by jumping onto the cab of the goat, attempting to pull the cab down to a closed position. (Perez, Ceja.) The piston rod broke and the cab moved quickly, hitting Rodriguez. (Exhibit 21.) Rodriguez was standing between the back of the cab and the roll bar mast when it slammed down and his skull was fractured. His hard hat is shown on top of the cab, near the mid-section of the roll bar, marked "impact area". (Exhibit 28.)

Whether the goat was being "repaired" is disputed, as discussed above. Employer argues that the safety standard does not apply since it is expressly limited to repair activities and that adding steering fluid is not a "repair".

The fundamental rule of construction and interpretation is to determine the intent of the agency issuing the regulation so as to effectuate the purpose of the law. (*Michael Paul Company, Inc.*, Cal/OSHA App. 97-3320, Decision After Reconsideration (May 30, 2001) citing *T.M. Cobb Co. V. Superior Court* (1984) 36 Cal.3d 273, 277.) The intent prevails over the letter, and the letter will be read to conform to the spirit of the statute. (See *Lungren v. Dukmejian*, (1988) 45 Cal.3d 727, 735.) The California Supreme Court directed the Appeals Board to liberally interpret safety orders to promote a safe and healthful working environment. (*Carmona v. Division of Industrial Safety*, (1975) 13 Cal.3d 303, 313.) The Appeals Board has held that the Occupational Safety and Health Act of 1973 requires any safety order interpretation "to be done in a light most favorable to employee safety." (*Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001).)

Replenishing the steering fluid required the employees to open the cab of the goat. The rod was bent during this process. In order to complete the job of refilling the steering fluid, it was necessary to close the cab in order to drive it. Once the rod was broken and the cab would not close, it needed to be repaired. The Division established that the bent rod problem involved repairing the goat. A violation of section 3664, subdivision (e) was established.

**D. Was the violation of section 3664, subdivision (e) properly classified as a serious violation?**

To sustain a serious violation, Labor Code section 6432, subdivision (a) requires the Division to establish the serious classification:

There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The legal standard "realistic possibility" is not defined in the safety orders. However, the Appeals Board has interpreted the phrase "realistic possibility" to mean a prediction "clearly within the bounds of human reason, not pure speculation." (*B & B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (Oct. 6, 2014) citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), which quotes *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (Apr. 30, 1980).) The occurrence of a serious injury is proof that a serious injury is a realistic possibility.

Aruejo's opinion<sup>12</sup> was that there was a realistic possibility of three fatalities, under the circumstances present here. Ceja and Perez were standing in the zone of danger within ten to fifteen feet from the open cab. Rodriguez was between the cab and the back guard. The hydraulic rod failed and no lock out/tag out procedures were used to prevent injury if there were a sudden movement of the cab. The Division has proven the elements necessary to create a rebuttable presumption that a serious violation has occurred.

To prove employee exposure to a hazardous condition: "there must be some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations." (*Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979). Three people were within the zone of danger at the time of the accident, Rodriguez, who stood between the roll bar and the cab, Perez and independent contractor Ceja, who stood a few feet from the cab. Employee exposure was established.

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire

---

<sup>12</sup> Aruejo's opinion was based upon a reasonable evidentiary foundation consisting of his education, experience and training. See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999.) Prior to working for the Division, he worked in the mining industry for 18 years and has a degree in Mining Engineering. He has worked for the Division as an Associate Safety Engineer for over six years, has conducted between 400 and 450 inspections. He is current in his Division mandated training. (Exhibit 29.)

work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.* Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).) Employer presented no evidence to rebut the presumption.

The realistic possibility of a serious injury, including death, combined with existence of the actual hazard caused by failure to make arrangements to reduce the probability of sudden movement of the cab comes within the definition of a serious violation as set forth in Labor Code section 6432.

**E. Did the Division establish that the failure to make arrangements to prevent sudden movement of equipment in Citation 2, Item 1 was the cause of the accident?**

To be accident-related, there must be a causal nexus between the violation and the employee's injuries. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).)

Rodriguez's head would not have been crushed between the cab and the back guard of the goat if the employer made arrangements to reduce the probability of sudden movement of the cab, which slammed down, pinned Rodriguez and fractured his head. The Division established that the serious violation was the cause of Rodriguez's death, and, therefore, the violation is accident-related.

Citation 2 was properly classified as serious accident-related. Employer stipulated that the \$18,000 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

The parties stipulated that the proposed penalty was correctly calculated in accordance with the regulations. The penalty of \$18,000 is reasonable and assessed, as set forth in the summary table. (§336, subd. (d)(1) – (5).)

**Conclusion**

The evidence supports a finding that the operators were not competent to operate the goat and excavator, in violation of section 3668, subdivision (a) (1) and the penalty of \$875 is assessed; the operator of the goat failed to check the vehicle at the beginning of the shift for proper functioning, in violation of section 3650, subdivision (t)(7); employees were permitted to make repairs on the goat before arrangements were made to prevent sudden movement of the equipment, in violation of section 3664, subdivision (e). The failure to prevent the sudden movement of the cab caused the decedent's head to be crushed between the roll bar and the cab. Employer failed to rebut the presumption that the citation was properly classified as serious.

**Order**

It is hereby ordered that Employer's appeal is denied. Citation 1, Item 1 and Item 2, and Citation 2, Item 1 are affirmed. The penalties set forth in the attached Summary Table shall be assessed.

DATED: July 7, 2015

MD:sp

---

MARY DRYOVAGE  
Administrative Law Judge

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD**

**ACTION METAL RECYCLING  
DOCKET 13-R2D2-1125/1126**

**DATE OF HEARING: October 23 and 24, 2014**

**Division's Exhibits**

<b><i>Exh. No.</i></b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	Contra Costa County Sheriff's Report dated 12/17/2012 (8 pages)	Yes
4	IBY letter to Action Metal Recycling dated March 4, 2013	Yes
5-1	DOSH document request to Action Metal Recycling dated Dec. 13, 2012	Yes
5-2	DOSH document request to Action Metal Recycling dated Jan. 22, 2013	Yes
6	Work Order from Ceja's Mobile Shop for 9/8/2012	Yes
7	CD of Interviews by Aruejo	No
8	DOSH Form 36 Accident Report, Dec. 17, 2012	Yes
9	Photograph of left side of yellow cab on goat and trailer	Yes
10	Photograph of right side of cab, lifted part way up	Yes
11	Photograph of front of cab on left side	Yes
12	Photograph of measurement of position of cab	Yes
13	Photograph of measurement of cab when fully closed	Yes
14	Photograph of measurement from floor to location of decedent's head prior to accident	Yes
15	Photograph showing measurement to location of decedent's head prior to accident – 64 inches from floor,	Yes

Ex.14

16	Photograph showing position of decedent's hard hat	Yes
17	Photograph showing decedent in position where he fell	Yes Under seal
18	Photograph showing decedent after accident	Yes Under seal
19	Photograph showing decedent after accident	Yes Under seal
20	Photograph showing sheriff examining decedent after accident	Yes Under seal
21	Photograph showing place where rod broke, held by Michael Miller during investigation	Yes
22	Photograph of bent rod, close up with measuring tape	Yes
23	Photograph of bent rod and engine on cab	Yes
24	Photograph of safety latch on side of cab	Yes
25	Photograph of side of cab	Yes
26	Photograph of two sheriffs during investigation and decedent after accident	Yes Under seal
27	Photograph of bent rod, close up	Yes
28	Two photographs, showing headboard on cab	Yes
29	Letter re: DOSH-mandated training of Aruejo is up to date, dated Sept. 17, 2014	Yes

**Employer's Exhibits**

None were offered.

**Witnesses Testifying at Hearing**

1. Detective James Normandin, Contra Costa Sherriff – Deputy Sheriff.
2. William Solano, employee of Action Metal
3. Luis Macias, employee of Action Metal

4. Manuel Perez Madrigal, former employee of Action Metal
5. Juan Carlos Ceja, Owner of Ceja Mobile Shop
6. Benito Sarabia Alvarez, employee of Action Metal
7. Ronald Aruejo, DOSH Associate Safety Engineer
8. Michael Miller, DOSH Regional Safety Engineer

**CERTIFICATION OF RECORDING**

*I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

July 7, 2015

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Site: 320 Pittsburg Avenue, Richmond, CA 94801

IMIS No. 314337833

Date of Inspection: 12/17/2012-03/21/2013

Date of Citation: 03/22/2013

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
13-R2D2-1125	1	1	3668(a)(1)	G	[Failure to ensure its operators were competent to operate an industrial truck safely.] Citation sustained by ALJ.	X		\$875	\$875	<b>\$875</b>
		2	3650(t)(7)	G	[Failure to perform required check prior to operating Hydraulic Excavator and yard mover.] Citation sustained by ALJ.	X		\$825	\$825	<b>\$825</b>
13-R2D2-1126	2	1	3664(e)	S	[Failure to prevent an employee from performing repairs on an industrial truck, resulting in the employee being fatally crushed between the cab and back guard of the truck.] Citation sustained by ALJ.	X		\$18,000	\$18,000	<b>\$18,000</b>
<b>Sub-Total</b>								\$19,700	\$19,700	<b>\$19,700</b>
<b>Total Amount Due*</b>										<b>\$19,700</b>

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board.  
**All penalty payments must be made to:**  
 Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142  
 (415) 703-4291, (415) 703-4308 (payment plans)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ: MD**  
**POS: 07/07/15**